

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN WESLEY HORN,

Plaintiff,

v.

GREGORY JONES,

Defendant.

CASE NO. 21-5244 RJB - TLF

ORDER ADOPTING REPORT AND  
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge Theresa L. Fricke. Dkt. 25. The Court has considered the Report and Recommendation and the remaining record.

The Report and Recommendation (Dkt. 25) should be adopted. No objections were filed. For the reasons stated in the Report and Recommendation, the Plaintiff's motion to strike is granted, in part, and denied, in part. The Defendant's first affirmative defense, failure to state a claim, should be stricken. Affirmative defenses must give "fair notice" to plaintiffs of the nature of the defense, which requires "describing the defense in 'general terms.'" *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (2015). The Defendant's claim, that the Plaintiff failed to state a claim, is premised on the facts alleged (or not alleged) in the Plaintiff's complaint, *Lee v.*

1 *City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001), and not on facts asserted in the  
 2 Defendant's Amended Answer. A defense which demonstrates that a plaintiff has not met its  
 3 burden is not an affirmative defense. *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088  
 4 (9th Cir. 2002). The order striking Defendant's first affirmative defense should be without  
 5 prejudice to raise the issue of failure to state a claim under Fed. R. Civ. P. 12(h)(2).

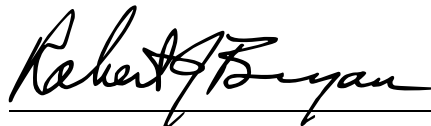
6 The Plaintiff's motion to strike the remaining affirmative defenses should be denied. The  
 7 case should be re-referred to Judge Fricke for further proceedings consistent with this opinion.

8 It is **ORDERED** that:

- 9 • The Report and Recommendation (Dkt. 25) **IS ADOPTED**;
- 10 • The Plaintiff's motion to strike (Dkt. 15) **IS GRANTED, IN PART** and  
 11 **DENIED, IN PART**;
  - 12 ○ The Defendant's first affirmative defense, for failure to state a claim, **IS**  
 13 **STRICKEN**, without prejudice to raise the issue of failure to state a claim  
 14 under Fed. R. Civ. P. 12(h)(2); and
- 15 • The case **IS RE-REFERRED** to Judge Fricke for further proceedings consistent  
 16 with this opinion.

17 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
 18 to any party appearing pro se at said party's last known address.

19 Dated this 4<sup>th</sup> day of January, 2022.

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21 ROBERT J. BRYAN  
 22 United States District Judge  
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